



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Patentee : Harris *et al.*
Serial No. : 10/717,217
Filed : November 18, 2003

Art Unit : 1614
Examiner : Raymond J. Henley III
Confirm. No.: 6038

Patent No. : 7,504,376

Issued : March 17, 2009

Title : **METHODS AND COMPOSITIONS FOR INCREASING THE
ANAEROBIC WORKING CAPACITY IN TISSUES**

MAIL STOP OFFICE OF PETITIONS / OPLA

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

REQUEST FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT
PURSUANT TO 37 CFR § 1.705(D)


Dear Sir:

Patentee hereby petitions for reconsideration of the Patent Term Adjustment (PTA) accorded the above-referenced patent at time of issuance. In view of the recent decision issued by the United State District Court for the District of Columbia in Wyeth v. Dudas, No. 07-1492, 88 U.S.P.Q.2d 1538 (D.D.C. 2008), reconsideration of the Patent Term Adjustment days to increase the total PTA by 525 days from 493 days to 1,018 days respectfully is requested.

As reflected in the file history, in good faith and candor, Patentee filed a *Letter Regarding Patent Term Adjustment at Allowance Pursuant to Comment 43 of the Final Rule* on December 12, 2008, which was granted February 03, 2009, thereby adjusting and

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I hereby certify that this paper is being deposited with the United States Postal "Express Mail Post Office to Addressee" Service under 37 CFR §1.10 on the date indicated above and is addressed to: Mail Stop Petitions, Commissioner for Patents, U.S. Patent and Trademark Office, P.O. Box 1450, Alexandria, VA, 22313-1450.


Jon Levy

increasing the APPL Delay by 39 days. Upon issuance of the present patent, the Patent Term Adjustment History and calculations were updated to include an entry on 02-25-2009 that recites "PTA 36 Months" with a zero total for PTO Delay Days.

In view of the holding in Wyeth, Patentee respectfully submits that this calculation is incorrect and respectfully requests reconsideration of the calculation of the Patent Term Adjustment days to increase the total PTA by 525 days from 493 days to 1,018 days. Wyeth holds that a Patentee is entitled to all days beyond the prescribed limits for various actions and activities, as long as the days don't overlap. The court concluded that periods of delay only "overlap" if they actually occur on the same calendar day. Accordingly, any delay that accrued under 35 U.S.C. §154(b)(1)(A) that occurred before the three year mark, which begins the accruing of 35 U.S.C. §154(b)(1)(B) days, must be counted in addition to all delays accruing under 35 U.S.C. §154(b)(1)(B) when calculating Patent Term Adjustment days.

35 U.S.C. §154(b)(1)(A) establishes that a patent's term is to be extended for each day that the PTO fails to meet particular deadlines. Such deadlines include issuance of a first Office Action within fourteen months and responding to a reply within four months. Patentee respectfully submits that the Office failed to meet these deadlines in the instant application. The first Office Action for the instant application was mailed by the Office on January 05, 2007. This is more than three years after the filing date of the application (November 18, 2003). This is a **PTO delay of 717 days** beyond the 14-month due date. Accordingly, Patentee had accumulated 717 PTO delay days under 35 U.S.C. §154(b)(1)(A) by January 05, 2007. The Office maintained that total PTO delay of 717 days until and at issuance, March 17, 2009.

35 U.S.C. §154(b)(1)(B) establishes that a patent's term is to be extended for each day that the application is pending beyond three years from the filing date. The three-year clock stops if certain events occur, such as the filing of a *Request for Continued Examination* (RCE). **The PTA 36 month deadline for this application was November 18, 2006** (48 days before receipt of a first Office Action). In the instant application, the filing of a *Request for Continued Examination* on May 06, 2008, stopped the three-year clock in the same manner as an issuance. Accordingly, Patentee had accumulated an additional **534 PTO delay days** under 35 U.S.C. §154(b)(1)(B).

35 U.S.C. §154 states that, to the extent that days accorded under 35 U.S.C. §154(b)(1)(A) and §154(b)(1)(B) overlap, that patent term adjustment "shall not exceed the actual number of days the issuance of the patent was delayed." Patentee respectfully submits

that there is a **48 day** overlap between the days accorded under §154(b)(1)(A) and §154(b)(1)(B) because the first Office Action was received 48 days after the three year time period prescribed in §154(b)(1)(B). Therefore, these overlapping 48 days have been subtracted from the total **534 PTO delay days** under 35 U.S.C. §154(b)(1)(B) to yield **486 PTO delay days** under §154(b)(1)(B).

In accord with the ruling set forth in Wyeth, Patentee respectfully submits that Patentee is entitled to 717 PTO delay days under 35 U.S.C. §154(b)(1)(A) **and** 486 PTO delay days under 35 U.S.C. §154(b)(1)(B) for a total of 1,203 PTO delay days. There were 185 APPL delay days in this application. Thus, the PTA for this patent should be:

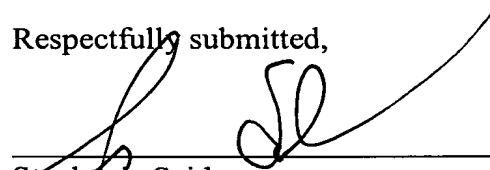
PTO delay (717 plus 486) minus APPL delay (185) = 1,018 days.

Only 493 PTO delay days were accorded this patent at allowance. Therefore, Patentee is entitled to an additional 525 days of PTA in accord with the ruling set forth in Wyeth.

In summary, and in consideration of the foregoing, Patentee respectfully requests correction of the calculation of Total PTA, under the provisions of 37 C.F.R. §1.705 and 35 U.S.C. §154 in view of Wyeth, to include the 486 PTO delay days accumulated under 35 U.S.C. §154(b)(1)(B) after January 05, 2007 (1st Office Action) until May 6, 2008 (RCE), resulting in a **Total PTA of 1,018 days** instead of the 493 days currently accorded this patent.

Patentee believes that no fee is due for the filing of this request. Any fees that may be due in connection with the filing of this paper should be charged to Deposit Account No. 02-1818.

Respectfully submitted,



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